With respect to the learned President, I do not think in the case here justice has been necessarily served by the order forfeiting all the money to the Government. He should have considered first whether out of the amount recovered from the petitioner there was money regarding which the offence of robbery appears to have been committed and then the manner as to its disposal. As observed earlier, the main power that is given to the court under section 407 of the Code is the power of disposal; and the power of forfeiture or confiscation is merely incidental. The learned President should also have referred to section 412(i) of the Code which empowers the court to order property to be restored to the possession of the person who has been dispossessed, and to section 426(i)(b) which empowers the court to order payment of compensation by a person convicted of a crime to the person injured of his property by the crime for which the sentence is passed. Then the learned President should have regard to the victim of the robbery who had been deprived of $5,000 for nearly 2 years. Considering these powers and the circumstances of the case, I do not think the order of forfeiture should stand. I would set it aside and order that out of the money recovered from the petitioner, a sum of $5,600 be paid to Ng Khay Niat, the person named as the victim in the robbery charge. The amount is calculated on $5,000 with interest at 6% per annum for 2 years.

As to the remainder, *i.e.* $2,590, it is shown in another case the petitioner extorted $100. It is not known whether the victim has recovered the money, and since it was indicated in the court below that there were other similar charges pending against the petitioner, the only way to deal with the remainder is to make no order. Then by operation of section 406A of the Criminal Procedure Code it should be handed over to the police officer in charge of the proceedings. It is a matter for the police to deal with it in accordance with the provisions of chapter XLI of the Code.

Order accordingly.

LIM THIAN HUAT v. FOZDAR

[A.Cr.J. (B.T.H. Lee J.) August 6, 1973]
[Kuching — Criminal Appeal No. K. 11 of 1972]

Criminal Law and Procedure — Complaint — Dismissal of complaint by Magistrate — Reasons to be recorded — Whether Magistrate can take into consideration report of previous police investigation — Sarawak Criminal Procedure Code (Cap. 58), ss. 119-121.

The appellant had made a report alleging the commission by Dr. Fozdar of the offence of intentionally using force. The police investigated the matter and recommended no further action. The State Advocate-General to whom the matter was referred by the appellant decided that no criminal prosecution should be instituted by the police. The appellant then made a complaint to a magistrate but he alleged that the magistrate did not reach any decision in the matter. Subsequently, the appellant obtained an order of mandamus for the complaint to be considered by the magistrate. The learned magistrate after considering the complaint and taking into consideration the report of the police investigations dismissed the complaint and stated his reasons for doing so. The appellant appealed against the order of the learned magistrate.

Held: (1) the learned magistrate in this case had considered all the materials which he had to consider and there was nothing improper in the order passed by him;

(2) there was nothing in law to prevent the magistrate from looking at the report of the police investigations which were completed before the complaint to him was made;

(3) as the learned magistrate had formed his own conclusions regarding the question of prima facie case after due consideration of the statement of the complainant and had given his reasons for dismissing the complaint, there were no grounds for interfering with his order.

Cases referred to:-

(1) *Virabhadrayya* v. *Vryicherla* 2 Weir 244.
(2) *Palai Lal* v. *Pasupati* 21 C.W.N. 127.
(3) *Ramanand* v. *Ali Hassan* 26 Cr. L.J. 129

CRIMINAL APPEAL.

T. O. Thomas for the appellant.
Steve Shim for the respondent.

B.T.H. Lee J.: This is an appeal from an order of the learned Magistrate, District Court, Kuching, made on 25th May, 1972 dismissing the complaint by the appellant.

The facts out of which this matter arose are briefly that on the 10th November, 1971, the appellant served a writ of summons on Dr. J. K. Fozdar at his clinic. It was alleged that the doctor had an argument with the appellant in the course of which force was used on the appellant and formed the subject of a complaint, an alleged offence under section 350 of the Penal Code.

The appellant's version as to what happened on that date in respect of which a report was lodged with the police was as follows: —

"On 10/11/71 at about 1025 hours I and Mr. John went to Poliklinik in Jawa Road to serve writ of summons and notice of motion in Civil Suit No. K. 242/71 (on the first defendant Dr. J. K. Fozdar). I am working with the T. O. Thomas and Co. He signed proof copy of notice of motion but he refused to return to me, and he also refused to sign and to accept the writ of summons. When I requested several times from him to return the proof copy of notice of motion, he raised up in anger and pushed me with his both hands at my left chest, and asked me to get out or else he would throw me out. Then I told him, he should not have used force, and he asked me to get out because that was his office. But I told him if he returned me the proof copy of notice of motion then I would leave, and he refused to do so. Then I told him, if he refused, I wouldn't leave. Then he rang up his lawyer Lim in my presence, and after his conversation with his lawyer, he returned to me the proof copy of motion. But he refused to sign the proof copy of motion. So, I left the service copy on his table, and I and John left his office.

(sgd. Lim Thian Huat)
10/11/71."

The police investigated the matter and recommended no further action.

The Sarawak State Attorney-General to whom the appellant referred his complaint replied that he saw no justification upon the facts for the institution of a criminal prosecution by the police. It was open to the appellant to institute a private prosecution against the person concerned if he was minded so to do.

It was alleged that the magistrate to whom the complaint was made did not reach any decision in the matter.

Application by appellant for leave for an order of mandamus was granted by the High Court on 27th April, 1972 and on 16th May, 1972 the High Court ordered the magistrate to consider and to decide within ten days the complaint made to him by Lim Thian Huat on affirmation on 7th December 1971.

I will deal first with the provisions of section 350 of the Penal Code. The section reads as follows: —

"Whoever intentionally uses force to any person, without that person's consent, in order to commit any offence, or intending, by the use of such force, to cause or knowing it to be likely that by the use of such force he will cause injury, fear, or annoyance to the person to whom the force is used, is said to use criminal force to that other."

I think it convenient that the ingredients of section 350 Penal Code be set out.

The points requiring proof are: —

(1) That the accused, used force to the complainant:
(2) That he did so intentionally;
(3) That he used it without complainant's consent;
(4) That he did so in order to commit an offence or with the intention of causing or knowledge of the likelihood of its causing injury, fear or annoyance to the complainant;
(5) That he received no grave and sudden provocation from the complainant.

Upon receipt of the order of the court the magistrate as he was required by law examined the appellant on oath and in his examination on oath the appellant gave his version of what happened. He said that:

"1. On the 10th November, 1971 at about 10.25 a.m. Mr. T. O. Thomas's chauffeur John and I went to Jawa Road at the Poliklinik to serve a Writ of Summons and a Notice of Motion on the 1st defendant Dr. J. K. Fozdar in Civil Suit No. K. 242/71.

Dr. Fozdar asked us whether we could wait for a short while so that he could check up with his lawyer. A short while later we were asked by one of his nurses to go in. The doctor told me that he refused to sign and accept service of the writ of summons. And, what he already signed on the proof copy of the notice of motion he refused to return to me.

I told the doctor in the presence of the said chauffeur John that if he refused to sign and accept service he will have to return to me the proof copy of the notice of motion as I have to return to the High Court for their docket. I told him I shall leave the service copies of the Writ and the Motion to him if he refuses to sign and accept service. Inspite of my many requests to return to me the proof copy he stood up very fiercely and raised his voice and shouted at me to get out. He said 'if you do not get out I'll throw you out'. I told him 'if you return to me the proof copy I'll go out without your asking'. He said, 'now look, I told you to get out, this is my office'. Again, I requested for the proof copy he at once pushed me without warning on my left chest and said 'Get Out!, or, I'll throw you out'. I warned him that he should not use force. I told him I came as a process server of the High Court and if he returned to me the proof copy I can leave. He later, rang his lawyer and he was asked/advised to accept the motion and the writ. He later returned to me the proof copy of the notice of motion. He refused to sign on the proof copy of the writ and I left with him on his table the service copy of the writ and the motion.

2. I now pray for a summons to be issued and served on John K. Fozdar under section 351 & 352 of the Penal Code in order that he may be prosecuted for having assaulted the said Lim Thian Huat otherwise than on grave and sudden provocation and thereby committed an offence punishable under section 352 of the Penal Code.

Affirmed by the said)
LIM THIAM HUAT at Kuching)
this 7th day of December) (sgd.) Lim Thian Huat.
1971, at 1.55 o'clock in)
the afternoon)

BEFORE ME,

(Sgd. Adenan Haji Satem)."

The magistrate apparently had reason to doubt the truth of the complaint and he set out the grounds of his disbelief and dismissed the complaint.

The present application is against the order of the magistrate dismissing the complaint.

The appellant began by saying that "as a result of the push I did not suffer pain. I was shocked. I did not go to see a doctor after this."

His subsequent statements according to the learned magistrate appear to be contradictory and inconsistent. Nowhere in the complaint and subsequent enquiry does it state injury, annoyance or force.

It seems obvious that ingredient No. 4 of section 350 of Penal Code has not been satisfied. This ground alone in my view is sufficient to dispose of this application.

It seems to me (as it does to the magistrate) bearing in mind the provisions of section 120 of the Criminal Procedure Code that there was no sufficient grounds to issue process.

Objection has been taken on behalf of the appellant that the magistrate took into consideration information irregularly obtained from the police before making up his mind under section 120 of the Criminal Procedure Code as to whether it was necessary to "direct some police officer to make enquiries for the purpose of ascertaining the truth or falsehood of the complaint."

It is convenient at this stage to set out the provisions governing complaints. They are contained in section 119 to 121 of the Sarawak Criminal Procedure Code (Cap. 58) the material provisions of which read as follows: —

"119.—(1) When a judge or magistrate takes cognizance of an offence on complaint the judge or magistrate shall at once examine the complainant upon oath or affirmation and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the judge or magistrate.

120. If the judge or magistrate sees reason to doubt the truth of a complaint of an offence of which he is authorized to take cognizance he may, when the complainant has been examined, record his reason for doubting the truth of the complaint and may then postpone the issue of process for compelling the attendance of the person complained against and either inquire into the case himself or direct some police officer to make inquiries for the purpose of ascertaining the truth or falsehood of the complaint and report to him the result of such inquiries.

121.—(1) The judge or magistrate before whom a complaint is made may dismiss the complaint if after examining the complainant and recording his examination and considering the result of the injury, if any, made under section 120 there is in his judgment no sufficient ground for proceeding. (2) The judge or magistrate if he dismisses the complaint shall record his reasons for so doing."

According to *Mitra's* Criminal Procedure Code (14th Edn.) Vol. 1 commenting on section 203 Indian Criminal Procedure Code (which is our section 120) if the magistrate refers a case to the police for inquiry without recording any reasons and then on receiving the report from the police dismisses the complainant, the order of dismissal must be set aside. (See *Virabhadrayya* v. *Vryicherla*;[1] *Palai Lal* v. *Pasupati*,[2] found at page 816 of *Mitra's* Criminal Procedure Code (14th Edn.) Vol. 1 under paragraph 663- Recording Reasons). Here the magistrate has done so.

And at page 815 of *Mitra* under the heading "Scope":

"An inquiry cannot be directed under this section *before* the magistrate takes cognizance of an offence — *Shoukatmal*, 14 Cr. L.J. 600."

The matter does not however rest there.

There is a passage at page 818 of *Mitra* where the learned author says:

"Where an investigation has already been made by the police and witnesses have been examined by the investigating police-officer, the magistrate can merely look into the police papers for the purpose of ascertaining the truth or falsehood of the complaint. This section does not contemplate any particular form of inquiry; and so if upon looking into the public papers the magistrate is satisfied that this is not a fit case in which process should issue, he can dismiss the complaint — *Ramanand* v. *Ali Hassan*, 26 Cr. L.J. 129(131) (Pat)."

I think it may be useful for the present purpose to read in full a passage in the judgment of *Ramanand* v. *Ali Hassan*[3] at page 131:

"It is open to the magistrate to investigate into the matter in order to ascertain the truth or falsity of the complaint in any way he thinks proper. In the present case an investigation had been made by the police and witnesses had been examined by the investigating police officer, and there was nothing in law to prevent the sub-divisional magistrate from looking into those papers for the purpose of ascertaining the truth or falsehood of the complaint. The enquiry contemplated by section 202 is not limited to any particular form of enquiry and if upon looking into the police papers, the learned sub-divisional magistrate was satisfied that it was not a fit case in which process ought to be issued against the accused person, I see nothing wrong in law in magistrate doing so."

Similarly *Sohoni's* The Code of Criminal Procedure (16th Edn.) Vol II at page 1270 commenting on section 203 of Indian Criminal Procedure Code said under *II-Competency of Courts to dismiss Complaints Note 21 at page 1277*:

"The magistrate has to form his own conclusions regarding the question of *prima facie* case after consideration of the statement on oath of complainant and where the matter has been referred to the police for the enquiry, the police report as well. *Pramatha Nath* v. *Saroj Nandan*, A.I.R. 1962 S.C. 876."

Here we have a situation where the police investigations had been completed before the complaint before the magistrate was launched. That there is nothing in law to prevent the magistrate from looking into those papers, is clearly demonstrated by the case of *Ramanand* v. *Ali Hassan*.

A number of points were taken in the notice of appeal, some of which in my opinion really raised in slightly different forms of the same point, namely that the learned magistrate took into consideration information irregularly obtained from the police.

In my view, there is neither substance nor merit whatsoever in the other grounds.

The magistrate in his order dismissing the complaint has considered all the materials which he had to consider. After going through the record I am clearly of opinion that there is nothing improper in the order passed by the magistrate. I am satisfied that the magistrate has formed his own conclusions regarding the question of *prima facie* case after due consideration of the statement of the complainant whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against Dr. Fozdar.

The learned magistrate has given his reasons (with which I agree) for coming to his conclusions, and in my view this complaint was rightly dismissed.

I do not think under the circumstances of this case there are adequate grounds for interfering with the order of the learned magistrate, and I dismiss this appeal.

Appeal dismissed.

CHIN HUA SAWMILL CO. SDN. BHD. v. TUAN YUSOFF BIN TUAN MOHAMED

[F.C. (Tun Azmi L.P., Suffian and Ali F.JJ.) August 10, 1973]
[Kuala Trengganu — Federal Court Civil Appeal No. 28 of 1973]

Practice and Procedure — Failure to serve notice of appeal within prescribed period — Applicant precluded from appealing unless special leave given — Federal Court (Civil Appeals) (Transitional) Rules, 1963, rr. 7, 13 and 73.

In this case judgment against the applicant had been pronounced on February 1, 1973. Notice of appeal was filed by his solicitors on February 14, 1973 but the notice of appeal was not served on the respondent till May 27, 1973.

Held: (1) failure to serve the notice of appeal on the respondent within the prescribed period of one month precluded the applicant from appealing unless special leave of the court was given;

(2) in the circumstances of this case as the failure to serve the notice was due to the solicitor's mistake, there was no ground for granting special leave.

Cases referred to:-

(1) *Gurbachan Singh* v. *Seagrott and Campbell (No. 2)* [1962] M.L.J. 370.

(2) *Christopher* v. *Croll* (1885) 16 Q.B.D. 66.

FEDERAL COURT.

A. Wilson for the appellant

Datuk Wan Mustapha for the respondent.

Ali F.J. (delivering judgment of the Court): This notice of motion for an order to extend the time to serve the notice and record of appeal on the respondent was dismissed on the date of hearing June 11, 1973. We now give our reasons.

The judgment against the applicant was pronounced in the High Court at Kota Bharu on February 1, 1973. On February 14, 1973 his solicitors filed a notice of appeal in the Registry of that Court. But it was not served on the respondent until May 27, 1973. In view of rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules 1963 which prescribes the time limit for bringing an appeal, it is clear that the respondent was not served with the notice within the prescribed time of one month. The question is whether this precludes the applicant from appealing. The same question arose in *Gurbachan Singh* v. *Seagrott & Campbell (No. 2)*.[1] The then Court of Appeal considered rules 1A(1), 2 and 15 of Order 58 of the Rules of the Supreme Court, 1957 which are respectively identical in terms as rules 6(1), 7 and 13 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963, hereinafter referred to as the 1963 Rules. Thom-